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In The

Supreme Court of the United States

October Term, 1989

INDEPENDENCE BLUE CROSS, PENNSYLVANIA BLUE SHIELD, and DAVID S. MARKSON,

Petitioners,

v.

U.S. HEALTHCARE, INC., UNITED STATES HEALTH CARE SYSTEMS OF PENNSYLVANIA, INC., and HEALTH MAINTENANCE ORGANIZATION OF NEW JERSEY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE CASE 1

A. Factual Background 2

B. The Decision Of The Court Of Appeals 3

REASONS FOR DENYING THE PETITION..... 6

A. The Court Of Appeals Properly Applied This Court's Commercial Speech Doctrine In Finding That The Advertisements Were Commercial Speech And Therefore Not Entitled To Enhanced First Amendment Protection..... 6

B. Commercial Speech In Advertisements Is Not Immunized By Linking A Product To A Current Public Debate..... 10

C. Expansion Of The Protection Accorded Commercial Speech Would Harm The Public Interest..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 8

Bigelow v. Virginia, 421 U.S. 809 (1975) 11

Board of Trustees of the State University of New York v. Fox, 109 S. Ct. 3028 (1989) 7, 8, 11, 12

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 4, 5, 7, 10

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 477 U.S. 557 (1980) 4, 5, 7, 8, 9, 10, 11, 12

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 3, 7

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 3, 6, 10

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) 5

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 7, 8, 9, 12

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 3

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986) 8, 11

Procter & Gamble Co. v. Chesebrough-Pond's, Inc., 747 F.2d 114 (2d Cir. 1984) 13

Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, 902 F.2d 222 (3d Cir. 1990) 13

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) ... 7, 8, 11

TABLE OF AUTHORITIES – Continued

Page

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 3, 7, 8, 9

STATUTES

Lanham Act
15 U.S.C. § 1125(a) 1

COUNTERSTATEMENT OF THE CASE

This action stems from comparative advertising promoting the competing health care insurance and health maintenance organization products offered respectively by petitioners and respondents. Respondents claimed that petitioners' advertising was false and misleading, and alleged a claim of federal unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), and common law claims of defamation, disparagement, and interference with contractual relations. Relying on settled precedent, the Court of Appeals for the Third Circuit held that the advertisements were commercial speech, and that such speech is not entitled to the heightened standard of First Amendment protection accorded to noncommercial speech.

In so holding, the court of appeals did not, contrary to petitioners' groundless arguments, conclude that existing First Amendment doctrine is "unsuited to this kind of case," nor did it engage in a "novel analysis" of the issue, nor did it "depart[ ] from this Court's approach in First Amendment cases." Petition for Writ of Certiorari ("Pet.") at 2. Rather, the court merely applied this Court's clear precedent, under which accurate, nondeceptive commercial speech is entitled to limited constitutional protection, and false, deceptive or misleading commercial speech merits *no* protection. The inevitable result of this analysis was the court's holding that defamation, disparagement, federal unfair competition and interference with contractual relations claims based upon false product advertisements are not subject to the heightened

"actual malice" requirement applicable to claims stemming from noncommercial speech. Accordingly, the instant petition is without merit and should be denied.

A. Factual Background

Starting in the early 1970s, respondents began to offer federally qualified health maintenance organizations ("HMOs") as an alternative to petitioners' traditional indemnity health insurance. By 1986, U.S. Healthcare's HMOs could claim approximately 600,000 members. App. 4a. This rapid growth came primarily at the expense of petitioners' traditional insurance. App. 4a-5a.

Faced with this large loss of enrollment, in late 1985 petitioners started to develop a "preferred provider organization" ("PPO") type of health insurance in an admitted attempt to compete with respondents' HMOs. App. 5a. In July 1986, after much thought and deliberation, petitioners launched their new PPO, "Personal Choice," through a "deliberately 'aggressive and provocative' comparative advertising campaign." App. 5a. The most egregious of these advertisements went so far as to imply that HMO membership could cause the loss of life or health. App. 6a-7a.

The admitted purpose of petitioners' advertisements was to win back HMO members for Personal Choice. App. 5a. Respondents promptly brought the instant action alleging that these advertisements were false, deceptive and misleading. Respondents also instituted their own corrective advertising campaign in an attempt

to rebut the false information and innuendo disseminated through petitioners' advertising.

B. The Decision Of The Court Of Appeals

Following a trial, at the conclusion of which the jury was deadlocked 7-1 in favor of respondents, the trial court dismissed respondents' claims. On appeal, the court of appeals reversed.

The court of appeals noted that, under a "traditional analysis," an examination of applicable First Amendment interests would require a determination of whether the speech was of public concern and whether the plaintiff was a public figure. App. 33a. However, based upon this Court's unbroken line of cases holding that commercial speech is entitled to less protection than noncommercial speech, the court determined that the correct starting point for its analysis was a determination of whether the advertisements were commercial speech. App. 33a-34a (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773-74 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

The court of appeals recognized that this Court's commercial speech cases all involved governmental regulation, rather than claims by private plaintiffs. Thus, the court believed that the issue before it, to wit, the applicability of the commercial speech doctrine to a case for damages brought by a private litigant, was a matter of first impression. App. 27a. Since this Court's holdings in commercial speech cases were not expressly confined to

the area of governmental regulation, nor could they be so confined in any principled fashion, the court found them fully applicable to the instant case. App. 34a-36a. Accordingly, the court held that the actual malice standard did not apply to civil actions based upon false or misleading commercial speech. App. 45a.

In essence, the court of appeals held that since even truthful commercial speech is entitled to less protection than noncommercial speech, and false and misleading commercial speech merits *no* First Amendment protection, commercial speech is not entitled to heightened constitutional protection in the context of a civil damages claim.

In order to determine whether the advertisements were commercial speech, the court of appeals analyzed the advertisements under the three-part test for commercial speech enunciated in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983). App. 37a. The court concluded that all three of the *Bolger* elements were present in the advertisements at issue, App. 39a-40a, and further noted that the advertisements had all of the characteristics that make commercial speech durable and not susceptible to "chill." App. 40a.

The court of appeals specifically rejected petitioners' attempts to "blur further the lines the [Supreme] Court has sought to draw in commercial speech cases" by seeking to immunize their otherwise actionable advertisements by including references to an issue of "public concern." App. 42a-43a (quoting *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447

U.S. 557, 563 n.5 (1980)). The court noted that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." App. 44a (quoting *Bolger*, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5)).

Petitioners' argument that their advertisements do not simply "link" their products to a public debate, but that their products *are* the focus of a public debate, was also rejected by the court of appeals because there was "no principled distinction between the products in *Central Hudson* and those at issue here." App. 45a. The court held that the "heightened protection of the actual malice standard" was not necessary to provide the "breathing space" required by the First Amendment in noncommercial speech cases. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

The court of appeals also considered the traditional public figure analysis utilized in noncommercial speech cases. The court concluded that such an analysis was inapplicable here because an advertiser could always insulate itself behind the actual malice standard merely by including references to public issues in its advertisements. App. 49a. The court also held that, in any event, the parties were not public figures for the purpose of "commenting on health care" because they acted "primarily to generate revenue by influencing customers," not to resolve any issues of public concern. App. 49a.

Accordingly, the court of appeals concluded that the advertisements at issue, as commercial speech, were not entitled to heightened First Amendment protection,

including the actual malice requirement imposed by *Gertz* for cases involving noncommercial speech and public figures.

REASONS FOR DENYING THE PETITION

This case exhibits none of the criteria typically viewed with favor by this Court in determining whether to grant certiorari. Petitioners do not argue that the case presents any conflict between the courts of appeals or between a state court of last resort and a court of appeals. Rather, they argue that the court below improperly failed to accept their unprecedented argument that the actual malice requirement should be extended to commercial speech. This argument is unavailing because the court of appeals, in a reasoned and annotated opinion, carefully followed this Court's commercial speech jurisprudence and applied that established doctrine to the facts of this case. The court in no way "diminished" the limited constitutional protection for commercial product advertisements which relate to matters of public concern, since it applied this Court's precedent holding that product advertising which links a product to a matter of public concern nevertheless remains commercial speech.

A. The Court Of Appeals Properly Applied This Court's Commercial Speech Doctrine In Finding That The Advertisements Were Commercial Speech And Therefore Not Entitled To Enhanced First Amendment Protection

Petitioners incorrectly argue that the court of appeals created a new commercial product advertising "exception" to the public figure doctrine by not finding that the

advertisers here were public figures and not requiring proof of actual malice. This argument fails because it disregards the core commercial speech doctrine established by this Court and followed by the court of appeals in reaching its decision.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet*, 472 U.S. at 758. It is clear beyond peradventure that the First Amendment accords less protection to commercial speech than to other constitutionally protected forms of expression. *Zauderer*, 471 U.S. at 637; *Bolger*, 463 U.S. at 64-65. Indeed, commercial speech occupies a "subordinate position in the scale of First Amendment values." *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028, 3033 (1989) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

The fundamental reasons underlying this limited protection for commercial speech are fully applicable to the instant case. First, the economic motivation underlying commercial speech makes it unlikely that it will be chilled as noncommercial speech might be if afforded a lesser degree of protection. *Ohralik*, 436 U.S. at 462 n.20; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24 (1976). Moreover, commercial speech is more calculated in its origin than noncommercial speech, resulting in a greater opportunity to verify the accuracy of the speech without jeopardizing the free dissemination of ideas. *Dun & Bradstreet*, 472 U.S. at 758 n.5; *Central Hudson*, 447 U.S. at 564 n.6. Finally, if commercial speech were to be elevated to the same constitutionally exalted status as political or other

noncommercial speech, the force of the First Amendment's protection for noncommercial speech could be diluted by a simple leveling process. *See* App. 39a (citing *Ohralik*, 436 U.S. at 456); *see also Fox*, 109 S. Ct. at 3035; *Central Hudson*, 447 U.S. at 563-64 n.5.

Thus, only accurate, non-deceptive commercial speech is entitled to limited First Amendment protection. *Fox*, 109 S. Ct. at 3032; *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 340 (1986); *Central Hudson*, 447 U.S. at 562-63. False, deceptive or misleading commercial speech merits no First Amendment protection. *Zauderer*, 471 U.S. at 638; *Central Hudson*, 447 U.S. at 563; *Virginia State Board of Pharmacy*, 425 U.S. at 771-72.

Petitioners offer no reason why these basic principles should apply in the regulatory context but not in an action for damages under applicable state common law and the Lanham Act. Indeed, the policy reasons underpinning the doctrine fully apply in both contexts. The rules applied to commercial speech are distinct from those applied to noncommercial speech because the purpose of the limited protection accorded to accurate commercial speech, to wit, to facilitate informed and reliable decision-making, is not served by protecting false or misleading information. As this Court explained in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977):

> [T]he public and private benefits from commercial speech are derived from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

433 U.S. at 383.

In light of the foregoing principles, the court of appeals was required to analyze, as a threshold matter, whether the advertisements were commercial speech, since the result of that analysis determines the degree of First Amendment protection. "At the outset, we must determine whether the expression is protected by the First Amendment." *Fox*, 109 S. Ct. at 3032 (quoting *Central Hudson*, 447 U.S. at 566).

Speech that proposes a commercial transaction or encourages the buying or selling of goods or services, such as advertising, constitutes commercial speech. *Zauderer*, 471 U.S. at 637; *Ohralik*, 436 U.S. at 455-56; *Central Hudson*, 447 U.S. at 561-62. As the court of appeals properly held, and petitioners apparently no longer contest, the product advertisements here clearly meet this Court's test for commercial speech.

Thus, the court of appeals was correct in determining, as a threshold matter, that the product advertisements at issue constituted commercial speech. Since even truthful commercial speech is entitled to only limited First Amendment protection, and false, deceptive or misleading commercial speech merits no First Amendment protection, petitioners' argument that their advertisements should be entitled to the enhanced constitutional protection afforded noncommercial speech is clearly without merit.[1]

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[1] Petitioners argue that "the precise scope of the court of appeals' [holding] is open to some confusion" because, while the court held that the public figure test was inapplicable because of its finding that the advertisements were commercial

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B. Commercial Speech In Advertisements Is Not Immunized By Linking A Product To A Current Public Debate

Petitioners also argue that the commercial speech doctrine should be diluted by a requirement that commercial advertisements be subjected to an additional inquiry to determine whether they address "matters of public concern." This contention flies in the face of all established precedent. As this Court has expressly held:

> Advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech.

Bolger, 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

In *Central Hudson*, the Court specifically stated that many products could be tied in some way to public concerns such as health and rejected the suggestion that an advertiser should be permitted to avoid the proscriptions against false and misleading advertising by linking

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speech, it indicated, according to petitioners, that "a modified public figure test might be applied in future cases" through its statement that "a corporation must do more than the claimants have done here to become a limited purpose public figure under *Gertz*." Pet. at 13 n.12. However, the resolution of a possible future hypothetical situation, stemming from mere *dictum* and irrelevant to the result here, is not a sound basis for granting the petition for a writ of certiorari. Moreover, it is clear that the court of appeals merely meant that a corporation must do more than simply advertise to become a public figure – i.e., a corporation might become a limited purpose public figure when it makes direct comments on public issues. *See* App. 48a-49a.

its product to a current public debate. *Central Hudson*, 447 U.S. at 563 n.5; *see also Fox*, 109 S. Ct. at 3032.[2] Indeed, this Court has expressly rejected the argument that commercial speech encouraging the buying or selling of goods can be so "inextricably interwined" with "pure speech" that the entirety must be classified as noncommercial. *Fox*, 109 S. Ct. at 3031.

Petitioners also restate their argument, expressly rejected by the court of appeals, that their commercial advertisements are entitled to protection under *Bigelow v. Virginia*, 421 U.S. 809 (1975). This argument fails because this Court has expressly limited *Bigelow* to advertisements involving constitutionally protected activities such as abortion. *Posadas*, 478 U.S. at 345-46. Since the marketing of health insurance is clearly not a "right" protected by the Constitution, *Bigelow* provides no support for petitioners' unprecedented attempt to expand the protection accorded commercial speech.

Recognizing the difficulties posed by this Court's precedent, petitioners also try to distinguish their case factually by arguing that their advertisements do more than "link" their product to a public debate. Rather, according to petitioners, their health insurance products are themselves matters of public concern. This approach,

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[2] An additional reason underlying the principle that product advertisements are not shielded from scrutiny simply because they mention public issues is the extreme difficulty inherent in drawing lines between purportedly "important" commercial advertising and other advertising. *See Virginia State Board of Pharmacy*, 425 U.S. at 765.

if adopted, would create an exception which would swallow the commercial speech doctrine. Numerous products can be considered "themselves" matters of public concern. For example, tobacco, alcohol, drugs and automobile safety are "themselves" matters of public concern, as is every product which claims to be "environmentally safe."

As this Court stated in *Central Hudson*, petitioners "enjoy the full panoply of First Amendment protections for their direct comments on public issues." 447 U.S. at 562 n.5.[3] To require a parity of protection for both commercial and pure speech could invite dilution of the First Amendment's guarantee with respect to the latter. *Fox*, 109 S. Ct. at 3035; *Ohralik*, 436 U.S. at 456.

C. Expansion Of The Protection Accorded Commercial Speech Would Harm The Public Interest

Petitioners fail to address the problems which would be created if their arguments were accepted. Requiring actual malice as an element of a claim for, *inter alia*, federal unfair competition under the Lanham Act would literally gut the efficacy of the recently expanded

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[3] Petitioners' argument that "a paid advertisement or other commercial statement often may constitute the only viable means through which a company can comment directly *about its products or services*" (Pet. 21) (emphasis added) simply misses the point. Petitioners clearly are able to comment directly about health care issues *without* simultaneously promoting their products, if they choose to do so. *See Fox*, 109 S. Ct. at 3031.

remedies against false advertising available under that Act. *See* App. 13a-14a. Proof of actual malice, in the form of knowing falsity or reckless disregard for truth, is a difficult obstacle to surmount, and the public would be ill-served if every plaintiff in a false advertising case – whether a public agency or private litigant – was required to meet this high standard.

Proof of actual malice is generally only in the hands of the false advertiser. It is at best difficult, expensive and time consuming, and at worst impossible, to extricate such proof from the defendant. Thus, the almost inevitable result of petitioners' proffered exception to the commercial speech doctrine for product advertisements involving a public issue would be to immunize such advertisements, which are already "hardy" and "chill-resistant," from scrutiny. This would in turn remove the teeth from the Lanham Act and inure to the profound detriment of the public interest.[4]

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[4] It is settled law that the Lanham Act's civil remedies for false advertising do not require proof of intent. *See, e.g., Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222 (3d Cir. 1990); *Procter & Gamble Co. v. Chesebrough-Pond's, Inc.*, 747 F.2d 114, 118-19 (2d Cir. 1984). Acceptance of petitioners' position here would upset this body of established precedent.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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